

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

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In Re:) Case No. 19-30088-DM
) Chapter 11
PG&E CORPORATION AND PACIFIC)
GAS AND ELECTRIC COMPANY) San Francisco, California
) Tuesday, October 13, 2020
Debtors.) 10:00 AM
)

MOTION OF ELLIOTT MANAGEMENT
CORPORATION FOR (I) ALLOWANCE
AND PAYMENT OF ADMINISTRATIVE
EXPENSE CLAIM AND (II) TO THE
EXTENT NECESSARY,
RECONSIDERATION AND RELIEF
FROM THE CONFIRMATION ORDER
PURSUANT TO FEDERAL RULE OF
CIVIL PROCEDURE 60(B) [8536]

REORGANIZED DEBTORS' THIRD
OMNIBUS OBJECTION TO CLAIMS
(DUPLICATE CLAIMS). FILED BY
PG&E CORPORATION [8753]

REORGANIZED DEBTORS' FIFTH
OMNIBUS OBJECTION TO CLAIMS
(DUPLICATE CLAIMS). FILED BY
PG&E CORPORATION [8759]

REORGANIZED DEBTORS' SIXTH
OMNIBUS OBJECTION TO CLAIMS
(SATISFIED CLAIMS). FILED BY
PG&E CORPORATION [8978]

REORGANIZED DEBTORS' SEVENTH
OMNIBUS OBJECTION TO CLAIMS
(SATISFIED CLAIMS) FILED BY
PG&E CORPORATION [8981]

REORGANIZED DEBTORS' EIGHTH
OMNIBUS OBJECTION TO CLAIMS
(NO LIABILITY CLAIMS) FILED
BY PG&E CORPORATION [8983]

REORGANIZED DEBTORS' NINTH
OMNIBUS OBJECTION TO CLAIMS
(NO LIABILITY CLAIMS) FILED
BY PG&E CORPORATION [8986]

REORGANIZED DEBTORS' TENTH
OMNIBUS OBJECTION TO CLAIMS
(PLAN PASSTHROUGH
ENVIRONMENTAL CLAIMS) FILED
BY PG&E CORPORATION [8988]

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE DENNIS MONTALI
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES (Via Zoom):

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Court Recorder:

LORENA PARADA/ANKEY THOMAS
United States Bankruptcy
Court
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San Francisco, CA 94102

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SAN FRANCISCO, CALIFORNIA, TUESDAY, OCTOBER 13, 2020, 10:30 AM

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(Call to order of the Court.)

THE CLERK: Calling the matter of PG&E Corporation,
and we're recording now, Your Honor.

Mr. Simonds is joining now.

THE COURT: Okay. Mr. Simonds, can you hear me? Mr.
Simonds, can you hear me? And if so, you need to turn your
camera on, and say something in the mic.

Ms. Parada, can you hear Mr. Simonds?

THE CLERK: No, Your Honor.

THE COURT: All right. And we have others to come in?
Mr. Simonds, can you hear me now?

THE CLERK: One moment while I bring in Mr. Slack, he
has a hand raised. Mr. Slack is joining now. Mr. Galardi --

THE COURT: You should bring in Mr. Anker also. All
right.

Mr. Simonds, I can see you. Can you hear me?

MR. SIMONDS: I can, Your Honor. Can you hear me?

THE COURT: All right. Yes, fine.

Mr. Slack, can you hear me?

MR. SLACK: I can, Your Honor. Good morning, or
afternoon, wherever you are sitting.

THE CLERK: Mr. Anker is joining.

Shall I bring in Mr. Karotkin? He has raised a (audio

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interference). Your Honor?

THE COURT: Yes.

THE CLERK: Your video has frozen.

THE COURT: My video has frozen?

THE CLERK: Yes, on my end.

THE COURT: Mr. Slack, can you see me?

MR. SLACK: I can but you are frozen, Your Honor.

THE COURT: Can you hear me all right?

MR. SLACK: I can. Let's see if I unfreeze, and if I stay frozen, I'll just take -- turn the camera off and do it by audio.

Mr. Anker, can you hear me?

MR. ANKER: I can, and Your Honor, you -- I do now see you moving your head. So I think you've unfrozen.

THE COURT: Okay. Who is appearing for Elliott?
Is --

MR. ANKER: Mr. Galardi and Mr. Devore are appearing for Elliott, Your Honor.

THE COURT: Okay.

THE CLERK: Mr. Galardi is joining --

THE COURT: Ms. Parada, bring --

THE CLERK: -- in.

THE COURT: Yeah, okay, there we go. I thought we were going to see Mr. Goldblatt this morning after his warmup act this morning with the U.S. Supreme Court.

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1 MR. ANKER: He passes on his regards, Your Honor, but
2 as you note, he did have a warmup act this morning, and he
3 reported to me that he was exhausted, but felt good. I'll
4 leave it at that.

5 THE COURT: Well, it was just a warmup. I always
6 figured that's what he needed before he came into the main
7 event here.

8 MR. ANKER: We knew --

9 THE COURT: Mr. Galardi, can you hear me and see me?

10 MR. GALARDI: I can both hear you and see you, Your
11 Honor. Thank you.

12 THE COURT: All right. So as soon as Mr. Karotkin
13 comes in, I'll ask you all to state your appearances, and then
14 we'll get underway with the discussion. So will you bring --
15 are you having him on the way in, Ms. Parada?

16 THE CLERK: Yes, Your Honor. Mr. Karotkin's joining
17 now.

18 THE COURT: All right. Good morning, Mr. Karotkin.
19 Good to see you.

20 MR. KAROTKIN: Good to see you, sir. Thank you.

21 THE COURT: Are you going to argue also, Mr. Karotkin?

22 MR. KAROTKIN: It depends on how Mr. Slack does.

23 THE COURT: Okay. All right. Why don't you state
24 your appearances? Let's go with the debtors' counsel, and then
25 Elliott, and then the other two counsel. Just state your

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appearances for the record, please.

MR. KAROTKIN: Stephen Karotkin --

MR. SLACK: Your Honor, Richard Slack --

MR. KAROTKIN: Sorry.

MR. SLACK: Go ahead, Steve.

MR. KAROTKIN: Go ahead. Go ahead, Richard. Go ahead.

MR. SLACK: Your Honor, Richard Slack from Weil Gotshal & Manges for the reorganized debtors.

MR. KAROTKIN: Stephen Karotkin from Weil Gotshal & Manges for the reorganized debtors, as well.

THE COURT: All right.

MR. GALARDI: Good morning, Your Honor.

Gregg Galardi on behalf of Elliott Management Corp.

MR. ANKER: Good morning, Your Honor.

Philip Anker of Wilmer Cutler Pickering Hale and Dorr on behalf of the Canyon, Citadel, Farrallon, Davidson Kempner, Sculptor and Varde parties.

MR. SIMONDS: Good morning, Your Honor.

David Simonds of Hogan Lovells U.S. LLP on behalf of PIMCO.

THE COURT: And Mr. (audio interference).

All right. Come on -- I'll try to make everything work here. My connection was working fine.

Have you or Elliott, et al., divided up your time?

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1 Mr. Galardi, you have to unmute your mic.

2 MR. GALARDI: Apologies, Your Honor. We will take --

3 THE COURT: Mr. Galardi, you've got your microphone
4 muted.

5 MR. GALARDI: It's no longer muted, Your Honor. Can
6 you hear me?

7 THE COURT: Mr. Galardi, turn on your mic.

8 MR. SIMONDS: Your Honor, I hear Mr. Galardi. This is
9 David Simonds.

10 THE COURT: Yes.

11 MR. GALARDI: It is on, Your Honor. Can you hear me
12 now? You're frozen on my screen.

13 THE COURT: Yeah, I can hear you fine.

14 MR. GALARDI: Okay. Your Honor, we have divided up
15 the time. We would take twenty minutes for the beginning of
16 our argument, ten for rebuttal, and then Mr. Anker and I have
17 decided to split that first twenty minutes, twelve and eight,
18 and the final ten minutes, I believe seven and three.

19 THE COURT: All right. Well, it froze recently but if
20 it's acting quirky, and it freezes, I will just turn the camera
21 off, and stay on in the audio class. So all right.

22 I've read all the briefs. There's a lot of briefing,
23 and I've never in my career had to debate on what the word
24 pursuit means, except pursuit of culprits, but here we are
25 pursuing -- pursuit is the critical word.

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1 But Mr. Galardi, you're up, and I'm looking forward to
2 hearing from you.

3 MR. GALARDI: Thank you, Your Honor. And again, I
4 think you've put your finger exactly on the critical phrase
5 here. So let me just level set and be quick about it.

6 Your Honor, the issue as pursuant to the scheduling
7 order was whether the debtors will, on the face of the motion,
8 and the undisputed facts show that there is no circumstance
9 under which Elliott and the noteholders could proceed and
10 succeed on their administrative claims. Elliott and the
11 noteholders believe that they have not carried that burden
12 today.

13 I think to start, the debtors do not dispute that if
14 there were a breach of the -- our noteholder RSA, that would
15 rise to an administrative claim, whether there was a breach,
16 whether that's allowed is a factual matter I will leave for
17 another day.

18 What the debtors have interposed is, I would think,
19 five objections on legal basis and facts. First is that the
20 exculpation provision of the plan 10.8, exculpates this claim.
21 Second is, if it weren't exculpated, it was released, and then
22 I will say there were three follow-up arguments, waiver,
23 forfeiture, and no grounds to go and seek relief under 60(b).

24 I think Your Honor has put your finger on it, and I am
25 not capable enough of being able to put the language of the

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1 plan in front of you, but we specifically --

2 THE COURT: I have -- by the way, Mr. Galardi, I have
3 excerpts, every single critical excerpt is right here in front
4 of me, so you can --

5 MR. GALARDI: That's great.

6 THE COURT: -- refer to it, and I'll have it.

7 MR. GALARDI: And I figured that everybody else does
8 as well, Your Honor. So going specifically to 10.8, which I
9 think goes right to the heart of Your Honor's question is
10 whether or not 10.8 constitutes an exculpation of the debtors
11 for conduct that Elliott claims could give rise to a breach of
12 the noteholder RSA.

13 Your Honor has seen in the debtors' opening brief, and
14 we would endorse the debtors' opening brief with respect to
15 contracts interpretation, as you have to read the words as used
16 in the common language, that you read specific where general is
17 ambiguous, and as Your Honor has noted, you've never had a
18 dispute perhaps about the phrase pursuit, but that is exactly
19 the issue in this. Whether or not claims arising from a
20 breach, an alleged breach, of the noteholder RSA fall within
21 claims that are exculpated, our view is based on the specific
22 language of the terms "negotiation and pursuit" of the RSA,
23 there is no meaningful way to say that a claim for breach falls
24 within that particular provision.

25 In particular --

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1 THE COURT: And let me --

2 MR. GALARDI: -- as in --

3 THE COURT: -- (audio interference) any guidance on
4 what the word pursuit means in this context?

5 MR. GALARDI: Well, I think in this context, it has --
6 it can have a very specific meaning to -- just like you say,
7 you pursue bank robbers, or you pursue them, you are going
8 after them, and once you capture them, you are no longer
9 pursuing them. There is a temporal element to it that doesn't
10 really govern, and we would say in this particular instance,
11 and by its close neighbor, negotiation, it's negotiation and
12 pursuit. It goes to exactly the kinds of dialogues and
13 questions which Your Honor was somewhat familiar with, but a
14 lot happened outside of the court, the negotiations that were
15 to actually get and enter into.

16 So in that sense, we see pursuit means nothing but the
17 chasing down of the noteholder RSA, the temporal element
18 leading in, and the events leading into the RSA.

19 Another way, Your Honor, and I think the debtors
20 raised this at some point with respect to the reply, someone
21 might say well, pursuit could also be, that is trying to bring
22 it to the finish line. But in that -- and that language would
23 really be in furtherance of.

24 But again, Your Honor, we think that a breach, if
25 there is a breach, of the noteholder RSA, even if you were to

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1 read pursuit to be something in furtherance of the RSA, and you
2 were going to read it broadly, which we don't think is
3 appropriate, and go from entry into -- to confirmation, there
4 is no meaningful way to say that pursuit of the noteholder RSA,
5 that a breach could possibly be in pursuit of the noteholder
6 RSA.

7 So in our view, this is a specific claim, an
8 administrative claim, if it is a breach, and if we can sustain
9 our burden to show that it's a breach, then we believe it is
10 not an exculpated claim.

11 We believe that the other language around that, you
12 know, all the other language is not specific, and we believe
13 that 5. -- 2.1, I'm sorry, is the general rule that says
14 administrative claims get paid, then you see --

15 THE COURT: Well, there's a lot of time spent in the
16 briefs about how can there be a -- there's a conflict between
17 2.1 and 10.8, but I mean, I think the debtors are right in this
18 sense, an administrative claim has to be an allowed
19 administrative claim, and if there's no allowed claim, then
20 there's no conflict between the sections. You don't disagree
21 with that, do you?

22 MR. GALARDI: No, I absolutely don't disagree with
23 that, Your Honor, but the question really comes, which comes
24 first, and which comes second. I think the first issue is you
25 think you have to pay under the Bankruptcy Code, administrative

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1 claims. Then the question is, is there a carve-back of what
2 administrative claims can be paid. I think exculpation is
3 exactly that carve-back of administrative claims. They don't
4 have to be paid. Leave aside that only allowed administrative
5 claims have to be paid.

6 Then the carve-back has said, even if you had a valid
7 breach of fiduciary duty, or misrepresentation in the
8 negotiation and pursuit of the RSA, we don't dispute that those
9 types of claims are exculpated. So now the question is --

10 THE COURT: So if Elliott said I want a million
11 dollars because we negotiated, we bargained back and forth with
12 the debtor, and that the result was the RSA, you'd probably
13 concede that was a pursuit of the RSA --

14 MR. GALARDI: Absolutely, Your Honor.

15 THE COURT: -- and that's not --

16 MR. GALARDI: Absolutely.

17 THE COURT: Okay.

18 MR. GALARDI: And even to the extent --

19 THE COURT: We were pursuing the criminal --

20 MR. GALARDI: -- of (indiscernible) --

21 THE COURT: -- but we didn't catch him. Okay.

22 MR. GALARDI: Okay.

23 THE COURT: Okay. Got it.

24 MR. GALARDI: And even if it were -- you know, again
25 only subject to willful misconduct or something, but anything

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1 in that sense, knowingly and willingly, was given an
2 exculpation. Those types of actions, and quite frankly, people
3 were negotiating back and forth. There could've been claims.
4 There might not have been claims, but those are definitely
5 carved out.

6 Now the question is well, was the administrative claim
7 for breach carved out, and our view is no, because the
8 exculpation is specific to negotiation and pursuit. A breach
9 claim is not -- both leading up to the agreement, or we would
10 say even in furtherance of the agreement -- something that can
11 be carved out that was actually carved out and waived.

12 So we think we fall within 10.8, and it's not
13 exculpated, so you're back to the general rule, and allowed
14 administrative claim.

15 Similarly, when you get --

16 THE COURT: Well, but now -- but getting back to the
17 merits, if at the end of the day, the debtors win on the
18 merits, then there is no allowed administrative claim, but
19 that's --

20 MR. GALARDI: Absolutely agree.

21 THE COURT: -- that's okay. That's the same with any
22 other administrative claim that's defeated, whether it be a
23 trade claim, or Mr. Karotkin's reasonable fees, or anyone else
24 that has a traditional admin claim, right?

25 MR. GALARDI: Absolutely correct, Your Honor. There

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1 is nothing -- today is only about whether we get to go to that
2 hearing on the merits, as opposed to our dismissed because of
3 the exculpation is a bar to even asserting the claim.

4 Similarly, Your Honor, we believe that 10.9 for a
5 similar reasons, plus two other carve-outs in the except
6 language is not a bar to our claim because that says again, it
7 says except the right to remain in effect after the effective
8 date, and Your Honor we believe that an administrative claim
9 was preserved. There are 7.2 section, that allows for them to
10 dispute an administrative claim, and Your Honor, if it's not
11 settled, would resolve that.

12 Again, back to your fundamental point that an
13 administrative claim can be asserted but it could still be
14 disallowed post the effective date.

15 THE COURT: Well, does Elliott concede that 10.9(b) is
16 a valid release though, that it released anything that falls
17 within this exception to 10.b -- 10.9(b)?

18 MR. GALARDI: Again, I guess you're -- I'm not sure
19 exactly what you're asking, but let me say this, I do believe
20 it is a valid release.

21 THE COURT: Okay.

22 MR. GALARDI: We do believe that it released types of
23 claims, but we do not believe that it released the type of
24 claim that the breach of the noteholder RSA would've been able
25 to assert, and that is because of the two except clauses,

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1 because those rights to pursue those administrative claims were
2 reserved by the right to remain in effect after the effective
3 date, which again administrative --

4 THE COURT: Well, I guess I'm having trouble -- but
5 it's circular because the only right to get best efforts ended
6 on the effective date. So how did anything survive the
7 effective date that (audio interference) you could (audio
8 interference).

9 MR. GALARDI: You froze a little bit, Your Honor.

10 THE COURT: Sure.

11 MR. GALARDI: But I think what you were asking me, and
12 I'll stay -- say it is, if the best efforts ended on the
13 effective date, how could you pursue a claim --

14 THE COURT: What does that mean?

15 MR. GALARDI: -- after the effective date for the best
16 efforts?

17 THE COURT: The (audio interference).

18 MR. GALARDI: I don't know if anyone else is having
19 problems hearing his Honor --

20 THE COURT: Another (audio interference).

21 MR. GALARDI: -- but I'm having a problem.

22 MR. ANKER: I too am, Gregg.

23 THE COURT: There's the (audio interference) operative
24 (audio interference) event (audio interference) or let's put it
25 this way --

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1 THE CLERK: Your Honor, this is Ms. Parada?

2 THE COURT: -- the debtors' failure to --

3 THE CLERK: We're having --

4 THE COURT: -- (audio interference) --

5 THE CLERK: -- trouble hearing you.

6 Counsel, it appears we've lost Judge Montali. One
7 moment while we try and reconnect.

8 THE COURT: And again, I think -- can you hear me, Ms.
9 Parada?

10 THE CLERK: Yes, Your Honor. I can hear you, and I
11 see you now.

12 THE COURT: Well, I'm sorry, gentlemen, I didn't --
13 you know, everything was working fine. So Mr. Galardi, let's
14 go back up to the discussion about 10.9(b) and start over. I
15 won't run the clock against you. It's certainly my fault here.
16 Bad connection.

17 MR. GALARDI: And Your Honor, I think what you were
18 asking me when I lost you was well, didn't best efforts all
19 terminate on the effective date, and so why is there not a
20 release? Am I paraphrasing your question?

21 THE COURT: Yes, yes. That's correct.

22 MR. GALARDI: Sure. Your Honor, I think the issue
23 though is we are not saying that best efforts extended beyond
24 the effective date. What we are saying is a claim arose prior
25 to the effective date, and pursuant to the express provisions

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1 of the plan, 2.1, 7.2, I believe it is, and all the other
2 provisions, we had the right to enforce that as a breach of
3 contract claim, just as anybody else could administer it -- do
4 an administrative claim.

5 So it wasn't that there were best efforts breached
6 post-effective date. The efforts were -- we allege they were
7 breached beforehand, and then what 10.9 says is that as long as
8 you had that right in effect, as a -- to bring the breach claim
9 as of the effective date, and we did under the plan, then --
10 and it was brought under the plan, we were free to pursue that.

11 Indeed, in this case, unlike some cases, the debtor
12 didn't put a bar date for administrative claims. So our view
13 would be as a breach of contract matter under California law,
14 we could've waited four years. We didn't. We pursued it. We
15 pursued it right after the effective date, and we were entitled
16 to do --

17 THE COURT: Yeah, but you see --

18 MR. GALARDI: -- under 2.1 and 7.2 of the plan.

19 THE COURT: If you go down to the next page of 10.9(b)
20 in the middle of the very long, long paragraph, beginning at
21 about lines -- on the margin, lines 9 through 13, there's some
22 pretty broad language, and not language that's limited by the
23 word pursuit. So doesn't that get you anyway, in terms of --
24 it's hard to find where it is but -- because it's a long
25 sentence, but it seems to be that it's very, very broad in

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terms of what is released --

MR. GALARDI: But --

THE COURT: -- not limited to pursuit. Pardon me?

MR. GALARDI: Well, but I don't think it has to be limited to pursuit, Your Honor, and I'm trying to see the specific language, but as I have 10.9, what it is limited by however, is except for the rights that remain in effect, and after the effective date, to enforce the plan and the plan documents, and again, and as except as otherwise provided in the plan or in the confirmation order.

Those are two carve-outs specifically that allow, regardless of all the other words, and there's lots of them there, regardless of the words, as long as we had the right in the plan, which we say we do as an administrative claim, as a result of the breach, you don't swallow that all up.

What we couldn't do, for example, is pursue third parties, but we could in fact, pursue the debtors on our claims as pursuant to the plan, which the plan specifically contemplated.

So I understand that that's very broad language, and we could also say, well, it's broad and you go back to the exculpation, but I think you have to start with the premise, it's an administrative claim, it's not exculpated. Therefore, we have it. And the release provisions say that to the extent I have it, under the plan, and could enforce it under the plan,

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1 I could do so after the effective date.

2 That's the simple argument on -- it seems to me on
3 10.9, and the debtors have the burden to say why --

4 THE CLERK: Excuse me, counsel? Ms. -- oh, I'm sorry.
5 We had lost you for a minute --

6 THE COURT: I'm --

7 THE CLERK: -- Judge -- Your Honor.

8 THE COURT: No, I don't -- I am very frustrated again
9 by this because I'm not supposed to be having this (audio
10 interference).

11 (Pause.)

12 THE COURT: Sorry about this. This is not something
13 planned. Give me one second. I just have to move some papers.

14 (Pause.)

15 THE COURT: Okay. Let's try it now.

16 Mr. Karotkin never would've gotten his plan confirmed
17 on video, if I had the bad connections like I do today. All
18 right.

19 MR. GALARDI: I understand how frustrating it can be,
20 Your Honor. May I just try to finish up on your question about
21 the broad language in --

22 THE COURT: Yes.

23 MR. GALARDI: -- 10.9(b)?

24 THE COURT: Uh-hum.

25 MR. GALARDI: So Your Honor, first I think there's two

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1 aspects to it, one is when you look at claims against the
2 debtor, if you read it as broadly as Your Honor suggests it
3 might have been read, we see no principled objection -- no
4 principled way to demarcate between -- let's take a few classic
5 administrative claims, Weil Gotshal's fees, Lazard's fees, the
6 fee of the claims agent.

7 The only way those claims come in against the debtors,
8 is if it is this -- the two except language which we emphasized
9 in our pleadings, except the rights that remain in effect from
10 and after the effective date, and except as otherwise provided
11 in the plan, and that would include certain litigation claims
12 like ours, to the extent those litigation claims were not cut
13 back by the exculpation.

14 So Your Honor, we think that that is the appropriate
15 reading, but then it's not just simply -- but there are still
16 claims, it is meaningful, there are still claims for which
17 there are releases. The released parties are far broader than
18 the debtors and the reorganized debtors, and so we do believe
19 that there are claims that are released with respect to third
20 parties.

21 So we believe that you can give meaning to 10.9
22 without the particular broad reading of what we believe is
23 still preserved, the right to go with administrative claims.

24 THE COURT: Okay.

25 MR. GALARDI: So maybe I'll turn it to Mr. -- I think

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1 I've actually used my twelve minutes, Your Honor, so I may turn
2 it over to Mr. Anker, unless you had questions with me.

3 THE COURT: No, since I have been disconnecting for
4 more than twelve minutes, you have -- if you want to -- we're
5 just going to be loose on the time here, but let's let Mr.
6 Anker add what he wants to add, and then I'll come back to --

7 MR. GALARDI: Thank you.

8 THE COURT: -- you, and you'll have plenty of time for
9 rebuttal.

10 Mr. Anker? Good morning, again.

11 MR. ANKER: Good morning. Good morning, Your Honor.
12 Can you hear me?

13 THE COURT: Perfectly well.

14 MR. ANKER: Your Honor, I really want to make two
15 points, both going to questions you asked and let me start with
16 the last one 10.9(b), and I too have the plan with the numbers,
17 and I want to make sure you see the language that Mr. Galardi
18 was referring to. If on page 85 of 108, you start where
19 10.9(b) begins --

20 THE COURT: Right.

21 MR. ANKER: -- it's "As of and subject to the
22 occurrence of the effective date, except for the rights (audio
23 interference) remain in effect from and after the effective
24 date to enforce the plan and the plan documents." That
25 exception clause (audio interference) everything that follows,

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1 and our position simply is that one of the rights that remains
2 in effect from an (audio interference) effective date under the
3 plan is the right to file and have adjudicated an
4 administrative expense claim for events that occurred before
5 the effective date.

6 And then if you go on to the next page, that one
7 exception would be sufficient but if you go to line 2, it says,
8 "and except as otherwise provided in the plan, or the
9 confirmation order", and the plan provides that no
10 administrative claims are discharged in 2.1, all can be filed,
11 and all can be adjudicated post-effective date.

12 THE COURT: Now that goes back to the same point that
13 I mentioned with Mr. Galardi about circular because if it's not
14 an allowed administrative claim, then there's nothing to
15 assert.

16 MR. ANKER: If there's another provision in the plan
17 that disallows it, I completely agree with you, but that gets
18 to whether the exculpation provision disallows it, or -- and I
19 completely agree with your point, if you deny their initial
20 objection, we still have to prove that we have a valid admin
21 claim.

22 THE COURT: Right.

23 MR. ANKER: So I agree if the admin --

24 THE COURT: And if you lose that, then --

25 MR. ANKER: Right.

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1 THE COURT: -- we're back to square one because you
2 never had an allowed administrative claim to begin with.

3 MR. ANKER: Correct, Your Honor.

4 THE COURT: Okay.

5 MR. ANKER: The only question before you today though
6 is does this release kill us from the outset, and the answer is
7 it doesn't kill us from the outset because of both exceptions.
8 And I want to pick up just quickly on the last point Mr.
9 Galardi made about how reading those exceptions not to mean
10 what they say, will lead to an absurd result.

11 This provision (audio interference) all Releasing
12 Parties, cap R, cap P. If you look at the definition of that
13 term as defined in the plan at the outset in the definitions
14 in -- on page 31 of 108, section 1.180, the releasing parties
15 include (a) the debtors. Should I wait, Your Honor, or are you
16 with (audio interference)?

17 THE COURT: No, I don't -- I'm not going to turn to
18 the plan.

19 MR. ANKER: Okay. That's all right.

20 THE COURT: I got it. I know what the (audio
21 interference).

22 MR. ANKER: And then it says in S, as in Sam, "and
23 with respect to each of the foregoing entities, A through R,
24 such entities" and I'm going to skip words, "financial advisors
25 and attorneys."

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1 So how (audio interference) Weil Gotshal, how is it
2 that Lazard, how is it that all of them can assert an
3 administrative claim for their fees, notwithstanding that they
4 are Releasing Parties under 10.9(b). They can assert their
5 claim, and I don't belittle it. They have a right to because
6 of the two exceptions in 10.9(b) that I referenced.

7 Both of them say if the plan otherwise permits you to
8 file an admin claim, and it may be disallowed, nothing in this
9 release releases it. So they have a provision that says they
10 can file professional fees, so too the plan says in section
11 2.1, we can file an admin claim, and if you don't read those
12 exceptions as we are reading them, then frankly, all the
13 professionals are not entitled to a penny in this case.

14 And this is a common release. It's common to have a
15 release that seems very broad, but then it says key words,
16 except for all the rights under the plan, and therefore
17 everything the plan provides is preserved including the right
18 to assert an admin claim.

19 Your Honor, I'm going to -- Your Honor, I think you
20 may have just froze, so I'm going to stop right now unless
21 other -- unless you can hear me, but I don't see you any
22 longer.

23 THE CLERK: Counsel, this is Ms. Parada. It seems
24 we've lost Judge Montali. One moment.

25 MR. ANKER: Your Honor, let me just complete that

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1 thought, and then I was going to say, unless you had questions,
2 but you won't be able to ask them, I will move to the
3 exculpation.

4 Your Honor noted that if you look at the release
5 provision in 10.9(b), and you go to the second page, that is
6 page 86 of 108, and you go to line 9, what is released is very
7 broad, and I absolutely agree what's released is anything based
8 on, or relating to, or in any manner arising from either in
9 whole or in part, the debtors, the fires, the Chapter 11 cases.
10 Obviously all of the professionals' fees relate to the debtor
11 in the Chapter 11 cases.

12 And again, I'm not in any way begrudging them, or
13 arguing they should disgorge all their fees, I'm simply say --
14 and they've questioned, but the reason they shouldn't is
15 because the two except clauses in paragraph 10.9(b), except all
16 the rights under the plan including their right to file fee
17 applications, so too they except our right to assert an admin
18 claim, and Your Honor is entirely right.

19 If ultimately it gets disallowed, it gets disallowed.
20 We are not arguing (audio interference) that you should allow
21 the claim. We're arguing that their threshold objection to it
22 that fails as a matter of law, should be rejected, so we can
23 move to the merits.

24 With that, let me move to exculpation, and you began
25 by saying you've never had a case about what the word pursuit

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1 means, and it's not defined in the plan, but there's lots of
2 California cases just like there are federal U.S. Supreme Court
3 cases, saying where you have a term in a contract or a statute
4 that's not otherwise defined, it takes its common, normal
5 meaning.

6 And so I asked an associate on my team, what does the
7 dictionary tell us the word pursuit means, and here's Merriam-
8 Webster. In pursuit of means, "in order to achieve". So let's
9 pause there. Do the debtors achieve the noteholder RSA by
10 breaching it? Of course they don't.

11 Cambridge Dictionary has a similar definition.
12 Pursuit means, "an attempt to achieve something". The same
13 point, you don't achieve an agreement by breaching it.

14 The Oxford English Dictionary says pursuit is, "the
15 observance or carrying out of a plan, design, or order. The
16 action of proceeding or acting in accordance with a plan."

17 Do you act in accordance with an agreement by
18 breaching it? No, you do precisely the opposite.

19 So Mr. Galardi's right, first, pursuit has a temporal
20 element. It means actions taken in advance. You pursue an
21 agreement by entering into and negotiating the agreement. If I
22 were in common parlance to say I hope each of my three
23 daughters -- I have three daughters -- pursues a degree, higher
24 education, I'm asking that she, or hoping that she will go to
25 college, and maybe go to graduate school thereafter. I'm not

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1 suggesting what she should do later.

2 But even putting the temporal point aside, even if
3 pursuit can have an after-the-entry into the agreement,
4 breaching an agreement is not pursuing it. Complying with it
5 is pursuing it. Rejecting an executory contract in bankruptcy
6 is not pursuing it, assuming it is pursuing it.

7 Just a couple of more points. Mr. Galardi mentioned
8 the notion that it says negotiation and pursuit, and I'm not
9 going to attempt to butcher the Latin, I never studied it, but
10 there is the Latin principle that translates to literally, "a
11 word takes it meaning from the company it keeps".

12 Here the word pursuit takes it meaning from the
13 company it keeps, the word negotiation. One negotiates an
14 agreement before entering into it, not after, and one certainly
15 doesn't negotiate it by breaching it.

16 Third, under established California law, and
17 California law controls here because the plan says that
18 California law governs, ambiguities get construed against the
19 drafter. I don't think there's anything ambiguous here, but if
20 there is, the debtors, with sophisticated counsel, were the
21 drafters of these provisions of the plan.

22 And finally, just step back and think about
23 exculpation. I think we were right, and I understand there's a
24 disagreement here, when we said exculpation normally appears in
25 bankruptcy for the professionals, for management, not for the

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1 debtor because the debtor gets a release, gets a discharge, I
2 should say.

3 But even if exculpation covers the debtor, think about
4 what exculpation in bankruptcy is about. Everything people to
5 do to get to the finish line, to get to the plan confirmed,
6 that gets exculpated, not -- and that was entering into the
7 RSA, which enabled -- which caused all of our clients to
8 support the plan.

9 What's not exculpated is breaching, breaching those
10 agreements. Think about the implication of the debtors'
11 argument again. The debtors' note that the exculpation covers
12 not merely the noteholder RSA but the exit financing. Under
13 their argument, under the logic of their argument, they were
14 exculpated if the day after the plan was confirmed, they
15 decided to breach the exit financing. They simply didn't pay
16 for it. They didn't do anything to (audio interference). That
17 can't be right, as a matter of logic, and as a matter of what
18 exculpation (audio interference) to do.

19 We ask Your Honor, that you deny this motion. We do
20 not ask that you (audio interference) our admin claim today.
21 We are going to have to prove that claim, but we're entitled to
22 go forward and prove that it is an allowed admin claim, and if
23 so, then and only then will we be entitled to payment, just as
24 the debtors are free to go forward with their objection to the
25 claim.

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1 Your Honor, I think you --

2 THE COURT: Okay.

3 MR. ANKER: -- (audio interference) --

4 THE COURT: Can you hear me now, Mr. Anker?

5 MR. ANKER: I can, Judge Montali, and I was literally
6 about to say if you were on, unless Your Honor has questions, I
7 have said my peace but I am more than happy to address any
8 questions --

9 THE COURT: (Audio interference).

10 MR. ANKER: -- Your Honor may have.

11 THE COURT: Let me see if -- I'm trying to make the
12 audio work alone. You can hear me now, right?

13 MR. ANKER: I can, Your Honor.

14 THE COURT: Okay. I'm going to -- so I tried to call
15 in, and I'm killed on that phone, and I'm now -- and I'm not
16 going to put the video on. You're stuck with my name, and then
17 we'll see if we can finish the argument.

18 Again, I'm going to do everything I can to make sure
19 that everybody feels they've had their day in court here, and
20 not a victim of my hookups.

21 So Mr. Slack, I think it's your turn to -- and by the
22 way, Mr. Anker, I have no further questions at the moment.

23 MR. ANKER: Thank you, Your Honor.

24 THE COURT: You have all the time you want, but you've
25 got to turn your mic on. There you go.

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1 MR. SLACK: There we go. So good morning to you, and
2 Your Honor, Richard Slack, Weil Gotshal for the reorganized
3 debtors.

4 And Your Honor, let's put aside for today that no
5 rational economic actor would ever give up their significant
6 backstop rights, including the rights to significant fees for
7 no consideration once the Court approved the backstop motion.
8 In other words, the entire premise of the motion here is
9 absurd, and so let's focus instead on regardless of how absurd
10 the claims are on their face, that they're barred by the plain
11 language of the plan, and the confirmation order.

12 And Your Honor, there's sort of what I'll call a
13 direct route, and there's a lot of arguments that have been
14 made here, but the direct route is the exculpation clause, and
15 1127, and I'm going to focus on those two, and then talk about
16 the others.

17 But it's crystal clear the exculpation provision on
18 its face, not only expressly covers the debtors themselves, and
19 claims arising out of the administration of the estates in
20 multiple ways. It doesn't myopically only have one language --
21 one set of language dealing with the negotiation and pursuit,
22 and it's very important that we look at not just one piece of
23 it, but the entire exculpation clause which has independent
24 pieces to it.

25 And so because the plain language of the exculpation

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1 clause covers the claims, the only recourse that the
2 noteholders would have, since they didn't object to the plan,
3 and they didn't appeal, is to modify it, and the --

4 THE COURT: Well, they don't have a right to modify,
5 do they? Isn't the point you make?

6 MR. SLACK: They don't, Your Honor, and that's exactly
7 the point. So once you reach the point that they didn't
8 appeal, they didn't object, they didn't appeal, and they can't
9 modify, if Your Honor finds that they fall within the plain
10 language of the exculpation, and we're going to spend some time
11 on that because I think it's important, then this motion's
12 over, and it's --

13 THE COURT: No, I --

14 MR. SLACK: -- on the express lane.

15 THE COURT: -- I agree with you. If you persuade me
16 that Elliott, et al., is within 10.8, I think you win. The
17 question is it's like they failed to state a claim for relief.
18 It's like the 12(b)(6), an analog here, but that is not the
19 whole point we're debating.

20 MR. SLACK: And the good news, Your Honor, is we're
21 going to do just that. We're going to go through it because
22 Your Honor, what happened here is important only because it
23 explains why exculpation does what it does. What we have here
24 is a sophisticated distressed debt investors who already
25 received a hundred cents on the dollar, on their notes. They

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1 know exactly what they're doing, and they made a calculated
2 decision not to raise these claims before either confirmation,
3 or the effective date of the plan. And all of the
4 constituents, including the fire victims, they relied on the
5 exculpation in order to vote on the plan, and then having the
6 plan confirmed.

7 THE COURT: Well, that's kind of a --

8 MR. SLACK: And --

9 THE COURT: -- stretch to assume that the fire victims
10 understood the exculpation clause, but I will accept that the
11 plan was overwhelmingly accepted --

12 MR. SLACK: Certainly, the --

13 THE COURT: -- but I don't know how I'm supposed to
14 infer that those fire victims were out there saying well, I'm
15 happy with pursuit, rather than something broader than that.

16 MR. SLACK: I guess I would say this, Your Honor, is
17 that the fire victims here were represented by the TCC, the TCC
18 saw this language, relied on it, didn't object to it. And the
19 fact is that all of the parties here rely on the plan, so that
20 people don't lie in the weeds and wait until after the plan's
21 confirmed to bring a litigation claim, and indeed, it's
22 precisely this type of claim that the exculpation provision was
23 intended to prevent.

24 Your Honor, when you approved the exculpation, you
25 cited the Ninth Circuit in Blixseth, and the court in that case

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1 approving a narrowly-tailored exculpation as here, described
2 the type of claim that the exculpation clause covers, and what
3 Blixseth said was, "The exculpation clause here deals only with
4 the highly litigious nature of Chapter 11 bankruptcy
5 proceedings." As one of the bankruptcy attorneys in this case
6 stated during the bankruptcy court's hearings on the
7 exculpation clause, in bankruptcy proceedings, lawyers battle
8 each other tirelessly, oxen are goled.

9 And then the Blixseth court in reaching its
10 conclusions relied on the Third Circuit decision in PWS, and I
11 cite that because the Third Circuit in PWS approved an
12 exculpation clause that included the debtors, and in discussing
13 that case, the Blixseth court also said, "According to PWS,
14 similar limited exculpatory clauses focused on acts committed
15 as part of the bankruptcy proceedings, are apparently a
16 commonplace provision in Chapter 11 plans, presumably because
17 of the features of bankruptcy litigation just noted." The same
18 quote that I gave to Your Honor.

19 Thus, the purpose of the exculpation clause here is to
20 prevent a party from lying in the weeds, and then after
21 confirmation, and the effective date, springing hundreds of
22 millions of dollars in claims on the estate, which affects
23 every constituent, and that's why that claim is barred here
24 under the exculpation clause.

25 So let's look at 10.8 of the plan, Your Honor, and

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1 what I would say, Your Honor, is that 10.8 of the plan covers
2 these claims in at least five different ways, and each of
3 these -- they're not exclusive, each of these separately covers
4 the claim.

5 THE COURT: Well, your brief -- by the way, your brief
6 listed those five things, and I went back and read all five of
7 them again, all five of them, and we're back to did you do this
8 five different times, or are there five different ways that
9 this thing operates, but here there's only whether Elliott, et
10 al. falls in or outside of the phrase pursuit of.

11 MR. SLACK: I --

12 THE COURT: I mean the word pursuit of, if we exchange
13 pursuit to enforcement, perhaps we're done.

14 MR. SLACK: I'm not sure I understand the question,
15 Your Honor, because pursuit -- negotiation and pursuit which by
16 the way I think covers this, and I'll get to that in a second,
17 that only yields with one -- if you look at the clause itself,
18 the different areas that are exculpated are separated by
19 semicolons, and each one of those is a separate element, that
20 is not -- that is not discussed with negotiation or pursuit.
21 In other words, negotiation and pursuit does not deal with any
22 of them, other than a handful.

23 So I think it's important, Your Honor, to go through
24 10.8. 10.8, in the first part, it says that it exculpates and
25 releases all claims in connection with, or arising out of the

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1 administration of the Chapter 11 estates. Now, the noteholder
2 RSA and the performance under the RSA are indisputably part of
3 a confirmation process and a fundamental element of the
4 administration of the estates. And so even if the exculpation
5 clause contained no more language than just that, it's clear
6 that this alone would cover the claims here. But of course,
7 the exculpation clause goes further, and in 10.8 it says -- and
8 this is one that does have negotiation and pursuit -- it says,
9 "in connection with or arising out of the negotiation and
10 pursuit of the backstop commitment letters, the plan funding,
11 the restructuring transactions, or any agreement, transaction,
12 or document related to any of the foregoing."

13 So the first thing to recognize, Your Honor, and it's
14 interesting that this wasn't mentioned. It's not just that
15 what is exculpated is the pursuit. It's all claims arising out
16 of the pursuit and negotiation. And what does it say? Not
17 just the RSA transaction, but the backstop commitment letters.
18 So first the claims here are entirely premised on the debtors'
19 alleged failure during the negotiation and pursuit of the
20 amendment of the backstop letters and, in turn, during the
21 negotiation and pursuit of plan funding and the restructuring
22 transactions to use their best efforts to cause the backstop
23 parties to voluntarily transfer to the noteholder claimants
24 with no consideration certain rights under the backstop
25 commitment letters. It is absolutely --

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1 THE COURT: Mr. Slack? Mr. Slack, I'm following you
2 with my printed copy of 10.8. Are you looking at a copy where
3 you can match me up with the line numbers? Like at line -- the
4 phrase "negotiation and pursuit" shows up at line 15. And are
5 you looking at a version that is that way? I'm just trying to
6 highlight what --

7 MR. SLACK: Yes.

8 THE COURT: Okay. So where is --

9 MR. SLACK: So would it help, Your Honor, if I call in
10 my colleague, Kevin Kramer? Mr. Kramer can put up the
11 highlighted version, and we can go through it. Can we do that?
12 Can we call Mr. Kramer --

13 THE COURT: Well, we can do it. We can do it, but
14 what I want to explain to you is that I can do better if you
15 just point me to the words and I mark them as I --

16 MR. SLACK: Sure. I'm happy to do that, Your Honor.

17 THE COURT: Okay.

18 MR. SLACK: So --

19 THE COURT: And I want you to understand that I've
20 done the sharing of the screen before, and sometimes they're
21 too small for even me to look at. So that's why I've got the
22 real McCoy in front of me, so --

23 MR. SLACK: Yeah.

24 THE COURT: Thank you. Below line 15, and where do
25 you want me to zero in?

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1 MR. SLACK: Right. So the first thing, Your Honor, is
2 that it talks about in connection with or arising out of, and
3 then it has a number of different elements including the
4 administration of the Chapter 11 cases, which is on 14 and 15.
5 In connection with or arising out of under the next thing is
6 what we're talking about, the negotiation on 15 through 18.
7 Now there's a bunch of different transactions, and I sort of
8 went between them. But it says here in these lines, so and
9 we'd read, "in connection with or arising out of the
10 negotiation and pursuit of the backstop commitment letters, the
11 exit financing documents, the plan documents, the restructuring
12 transactions." And then, it says, "or any agreement,
13 transaction, or document related to any of the foregoing."

14 And so, Your Honor, what you have to look at is
15 whether these claims are in connection with or arise out of the
16 negotiation and pursuit of, for example, the plan funding. And
17 of course, that's exactly what they're saying, or the backstop
18 commitment letters. The claims here are entirely related to
19 the fact that they're saying, when the debtors were negotiation
20 and pursuing the plan funding and the backstop amendments, that
21 we didn't include them and that we didn't go out and ask folks
22 whether they were willing to give up their valuable rights in
23 connection with the amendments. And so there's absolutely no
24 question that under the plain language of the exculpation that
25 these claims fall under it. And Your Honor --

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1 THE COURT: Oh, but Mr. Slack, you could also argue
2 that the phrase "negotiation and pursuit of" modifies one of
3 the things that follow.

4 MR. SLACK: Well, but what it modifies -- and just so
5 to be clear, if you look at negotiation and pursuit, Your
6 Honor, you see it comes after the word cases, so it's within
7 that --

8 THE COURT: Yeah.

9 MR. SLACK: It's within that semicolon. So
10 "negotiation and pursuit" does modify everything in that list
11 that we're just -- that we're just talking about.

12 THE COURT: Right. Right. But that's the point, the
13 point that Mr. Galardi was arguing, that he doesn't -- he says
14 there's no pursuit of all these other things. It's something
15 else, like enforcement. And so, if the words had said
16 negotiation, pursuit, and enforcement, it might be --

17 MR. SLACK: So --

18 THE COURT: -- different. I just have to figure out
19 whether the word pursuit limits all these things because you
20 keep telling me -- and it doesn't help the argument to try to
21 tell me what no rational person would do. That's not the
22 point. Well, no rational person would agree to use their best
23 efforts to do something that no rational person would do, but
24 your client agreed to use best efforts to do something. And
25 for you to say, well, nobody would do it, is then all you had

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1 to do was use your best effort to get somebody to do something
2 that he would never do, and you'd win the case on the merits.
3 Right?

4 MR. SLACK: So Your Honor, I guess what I would say
5 there is is that at one point -- and this will come out -- the
6 debtors, in fact, went and asked folks -- and this is in a
7 footnote. But that's not what we're -- that's not what we are
8 dealing with today.

9 THE COURT: No, I know. I --

10 MR. SLACK: We're arguing with --

11 THE COURT: -- agree.

12 MR. SLACK: What we're arguing with, Your Honor, is
13 that the language here, "negotiation and pursuit" in this
14 particular context, also goes to the negotiation and pursuit of
15 plan funding. And the claims here, Your Honor, arise out of
16 and in connection with explicitly the pursuit and negotiation
17 of the plan funding and the backstop letters. And I haven't
18 heard anything or any explanation of how these claims don't
19 arise out of or are in connection with, for example, the plan
20 funding or the backstop commitment letters because what they're
21 saying is, Your Honor, we needed to during the negotiations use
22 best efforts to have these parties be part of the backstop
23 funding.

24 So what I would say to Your Honor is that this
25 language here, which isn't just the RSA but also talks about

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1 negotiation and pursuit of plan funding and the backstop
2 letters covers it. And Your Honor, what's important is is
3 that, because the language isn't just negotiation and pursuit,
4 it's in connection or arising out of the pursuit. And there's
5 again, when you talk about something arising out of the
6 pursuit, the agreement itself and the performance under arises
7 out of the pursuit. And so, you can't just say it's the
8 negotiation and pursuit. You have to look at the entire
9 language of the exculpation clause.

10 THE COURT: Oh, but Mr. Slack, I think you're ignoring
11 the semicolon because you just pointed out to me the word cases
12 at line 15 is followed by a semicolon. So if you just stop
13 right there, there's nothing about negotiation and pursuit.
14 But then, after the semicolon, it's negotiation and pursuit of,
15 and then you list twenty different things, which I agree. I
16 understand your point. And then, your point also is where over
17 on page --

18 MR. SLACK: So --

19 THE COURT: -- 12 and 13 of your reply brief, you've
20 got at least five other instances that you think make the case.
21 But they don't -- to some extent, one of them just repeats the
22 rising out of the administration language. That's where I'm
23 struggling to understand your point.

24 MR. SLACK: So let me try this, Your Honor. And first
25 off, I know this is just -- this is a clause construction, but

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1 the way the clause is constructed is -- and if you read it, it
2 says, "released and exculpated from", and then, it says, "in
3 connection with or arising out of". And then, everything that
4 follows, each of the -- each of the semicolons, comes after "in
5 connection with or arising out of". So you would read "the
6 administration of the estate", "the negotiation and pursuit",
7 "the property to be distributed", "the funding of this plan".
8 So all of them are modified by "in connection with or arising
9 out of" as you see it there.

10 And then, Your Honor, just to make a fine point of
11 this because I think it's important, if you go down to line 18,
12 all right, it talks about being released in connection with or
13 arising out of the funding of this plan. Now, the important
14 thing there is there is no negotiation or pursuit that limits a
15 exculpation with respect to the funding of the plan. So any
16 claim which arises out of or is in connection with the funding,
17 which is again precisely what these claims are. These claims
18 were, you didn't use best efforts to get us involved in the
19 funding of the plan. That's what these claims are, and they
20 are not limited -- this is not limited to negotiation or
21 pursuit, even if you were to decide that "arising out of the
22 pursuit" didn't include what we think it includes.

23 And Your Honor, another one says here in 10.8 if you
24 look a little further down, it exculpates and releases all
25 claims in connection with or arising out of the issuance of

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1 securities under or in connection with this plan, and that's at
2 line 20. And again, that is not -- that is not -- that is not
3 limited by negotiation and pursuit and at --

4 THE COURT: Mr. Slack, what you're arguing is what you
5 stated in detail back in your reply brief on page 6. I mean,
6 you did break out those same --

7 MR. SLACK: Yes.

8 THE COURT: -- five instances. I understand your
9 point, and I studied them when I was reading the briefs, and I
10 kept circling back to the point. So I understand your point.
11 Let's leave it at that and turn to the waiver and forfeiture.
12 And I understand the difference between a waiver and a
13 forfeiture, and I know what the -- Elliott et al., have argued.
14 How about --

15 MR. SLACK: Your Honor, I guess the point just to
16 finish off the exculpation is that the exculpation clause here,
17 because it's clear that in many ways it covers. The only issue
18 you have then, Your Honor, because it's the argument they
19 raised in their motion is whether 2.1, if I can use the word
20 without being political, trumps Section 2 -- or trumps Section
21 2.8. And what I would say to Your Honor is is that the
22 language, notwithstanding anything herein to the contrary with
23 respect to the exculpation clause, specifically mandates that
24 2.1 not override 10.8.

25 And Your Honor, the other point there which I think is

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1 critical is that -- and Your Honor, we agree with what you said
2 at the beginning of the argument, that 2.1 only deals with
3 discharge and allowed claims. And so, the fact is is that the
4 word discharge has to have a different meaning than release and
5 exculpate and --

6 THE COURT: Well, of course they do. I understand
7 they do. I mean, the --

8 MR. SLACK: And the point is is --

9 THE COURT: If you just have a simple proof of claim
10 for goods and services, the debtor gets its discharge, but the
11 claim is still an allowed claim, and it's taken care of under
12 the plan. And same with an administrative claim, if you had a
13 post-petition provider of services or goods, that person
14 would --

15 MR. SLACK: I --

16 THE COURT: There would be a discharge, but the
17 discharge wouldn't have any impact because that person's
18 provided for under the plan. I understand the point.

19 MR. SLACK: And so the point, Your Honor, is is that
20 if these are released, if they fall within the release or the
21 exculpation, the plain language, then 2.1 doesn't impact that.
22 So if Your Honor finds that these claims fall within the plain
23 language, which again I think they do in many ways, then that
24 ends the issue because as Your Honor pointed out, in order then
25 to deal with that, what the noteholders would have to do is

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1 modify the plan, which they can't do under --

2 THE COURT: Yeah. That's --

3 MR. SLACK: -- 1127.

4 THE COURT: That's why I wondered why you spend so
5 much time in both sides dealing with them. That to me is a
6 nonissue, but the issue is whether they can do it. So your
7 point as I take is, well, they should have done something.
8 They should have done something, and they waited too long. I
9 don't know whether I agree with that or not because I don't
10 know that an administrative claimant has to do anything.

11 But what about -- let's go back, Mr. Slack, to Mr.
12 Galardi's argument about 10.9(b). Do you think that the except
13 provisions and the provisions about matters that relate to pre-
14 petition -- excuse me, pre-effective date events are preserved
15 or not?

16 MR. SLACK: So Your Honor, we agree entirely with what
17 it sounded like your position was, which is that the except
18 language here only deals with pre-petition claims -- or things
19 that are post-petition. Anything that's pre-petition is
20 covered by the release. And if you think about it, it has to
21 be that way because all claims that are released occur pre-
22 petition, and all claims that are released that would have any
23 effect are claims that you could theoretically bring after
24 because of the statute of limitations or something else. So if
25 this language meant what Mr. Galardi and Mr. Anker suggest it

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1 means, then you would never be able to have a release of any
2 activity pre-petition that still had time left to bring post-
3 petition. So it completely negates any rational interpretation
4 of the release itself, Your Honor. So we would agree with
5 that.

6 THE COURT: Okay.

7 MR. SLACK: So Your Honor, with respect to a couple of
8 other points which I think are critical here, number one, Your
9 Honor, the release itself and when you look at the release
10 language -- and I think this is critical -- there's a reason
11 they didn't go in and look at the release language because the
12 release clearly covers again much like the exculpation clause
13 clearly covers this conduct. And so, unless they can pigeon-
14 hole it into one of the exceptions, which they can't do for the
15 reason Your Honor stated and the idea that 2.1 only deals with
16 discharge, if that claim is either released or exculpated, the
17 release overrides it and says you don't have an allowed claim.

18 And so, in this circumstance, Your Honor, when you
19 look at the release, and again I would urge Your Honor to give
20 separate meaning to both release and discharge. And 2.1 as
21 Your Honor recognized only deals with discharge, whereas the
22 release and the exculpation talk about exculpating and
23 releasing. And so where things have been exculpated and
24 released, they're not in conflict with 2.1 whatsoever.

25 So Your Honor, the last thing I guess I would get to

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1 because it sounds like we're on the same page on the
2 modification point, is that here what you had were
3 sophisticated parties who knew about supposedly this breach if
4 it was, which it isn't, long before the effective date, and
5 they did nothing. They could have done a lot, but they didn't
6 do anything. They could have filed a motion in front of the
7 Court. They could have objected to the backstop amendment.
8 They could have objected to the entry of the confirmation
9 order. They could have issued a notice of termination. They
10 could have filed injunctive relief. All of these things are
11 things that they had a right to do under the RSA, especially if
12 they viewed it as being breached.

13 THE COURT: But they also could have filed an admin
14 claim, which is what they did.

15 MR. SLACK: Yeah. And the difference, though, Your
16 Honor, and that's the point. They filed a motion for an admin
17 claim after the fact, after sitting on their rights, when
18 people were relying on the plan itself.

19 THE COURT: Oh, I understand. I understand. You said
20 that again. You start to play the heartstrings about bringing
21 in the fire victims, and they're taking money from the fire
22 victims. That's playing it too far, and I have to -- you've
23 got to convince me that somehow they let a valuable right go
24 away by their silence, and I'm -- so far, the notion in waiver
25 and forfeiture, they're there.

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1 What about last point for you, though, why is there
2 even a theory of 60(b) here? And I'm going to ask Mr. Galardi
3 and Mr. Anker to come back and address the 60(b), but what's
4 your take on that? It kind of disappeared in the briefing I
5 think.

6 MR. SLACK: Well, Your Honor, in our briefing, and I
7 think it's clear under the law, that 1127(b) is the exclusive
8 means by the Ninth Circuit to modify a plan. And so, once you
9 recognize that 1127(b) is the exclusive means to modify the
10 plan, then 60(b) does go away.

11 And what I would say, Your Honor, is when you look at
12 what we cited in both our briefs, our five cases that looked at
13 the issue of whether 60(b) could be used when 1127(b) wasn't
14 met, and these five cases all explicitly say you cannot use
15 60(b). And what's interesting is they cite a handful of cases
16 that have used 60(b) on modifying plans. None of them, none of
17 them address 1127(b). And the reason that the courts -- and
18 again there are five different decisions that we cite -- say
19 you can't use 60(b) when you haven't met the requirements of
20 1127(b) is because 1127 is the Code; 60(b) is a rule. 1127
21 overrides -- the Code overrides 60(b). And so, the cases are
22 all uniform, and they haven't cited a single case that would
23 suggest that you could use 60(b) when 1127 isn't met.

24 THE COURT: Okay. I got it. All right. Thank you,
25 Mr. Slack.

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1 MR. SLACK: Thank you, Your Honor.

2 THE COURT: Mr. Galardi, you and Mr. Anker and I don't
3 know if Mr. Simonds wants to say anything yet. Why don't you
4 go ahead and give me your final arguments?

5 And again, I apologize to all of you for the delays.
6 It seems to me we're working effectively now. You just can't
7 see me.

8 MR. GALARDI: I'm sorry for that, Your Honor, but it
9 does seem to be working now.

10 Very, very, very briefly and then I'll leave time for
11 the other parties. I think what Mr. Slack has done is conceded
12 that the exculpation clause and the specific provision
13 addressing the RSA is not adequate. But then, he reads five
14 other exceptions and says it must fall under those. But then,
15 it is they that cited in the first instance that the specific
16 governs over the general. And as Your Honor pointed out, there
17 is simply a semicolon after the word cases. And as you parse
18 through the language the specific provision, which Your Honor
19 started the hearing with, that is the most important is the
20 negotiation and pursuit of the RSA. And it would exculpate
21 them for -- even with respect to the wildfire claims to have
22 exculpated them for not following the claims resolution
23 procedures, if you read that language literally as Mr. Slack
24 would like to read it. So we think that, Your Honor, it is not
25 "exculpated and the arises in connection". At most, it has to

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1 be "arises and in connection with the negotiation and the
2 pursuit of", no broader and not with respect to breaches of the
3 contract.

4 Your Honor, with respect to, again, the releases, the
5 releases is -- I think I heard Mr. Slack and I don't think this
6 is what he intended, said it only goes to pre-petition conduct.
7 I think they are trying to read it more broadly than pre-
8 petition. I think he made pre-effective date --

9 THE COURT: Yeah, that's how I -- that's what I
10 interpreted it also, pre-effective date.

11 MR. GALARDI: And again, Your Honor, then I would go
12 back to if you read it that broadly and Mr. Slack failed to
13 give a principle demarcation between the claims of Weil,
14 Gotshal or the claims agent and how those except language don't
15 except out exactly the types of administrative claims that we
16 think could relate to pre-effective date conduct but could be
17 prosecuted and brought pursuant to the plan and the plan
18 document's post-effective date. That's exactly what, unless it
19 was paid and you go back to Section 2.1, or unless as Mr. Slack
20 said it was released in the exculpation language, it was
21 released. You could bring an administrative claim under the
22 plan after the effective date, and that is exactly what we did,
23 and that is exactly what we believe the exception clauses
24 govern.

25 Your Honor, with respect to the 60(b), waiver

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1 (sic) and forfeiture and coming back to a question that Your
2 Honor asked me and I responded to, do we believe that the
3 releases are enforceable? Yes, we believe the releases are
4 enforceable to the extent that the language that we have said,
5 the except language, is itself enforceable. Otherwise, the
6 releases would have been too broad, and we would challenge
7 those.

8 With respect to waiver and forfeiture and in
9 particular you could only waive or forfeit a right if at the
10 time you had to do so before the effective date, I think we
11 have made clear that our view is we did not have to seek
12 injunctive relief. There was nothing under the noteholder RSA
13 that required us to do so. If we do have an administrative
14 claim, which we believe we do, and it is not subject to the
15 exculpation clause, which we believe it is not, and it is not
16 subject to the release, which we believe it is not because of
17 the two except clause, there is nothing that precluded us or
18 even required us to bring it seven weeks, a month, two months,
19 five months. It had to be brought within the statute of
20 limitations period of four years. We brought it timely. So
21 when we --

22 THE COURT: Mr. Galardi, I'm sorry. Let me interrupt.
23 Mr. Wofford, who I believe is a colleague of yours, has a hand
24 up. Do you know -- did you intend to have him argue or
25 something to say something?

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1 MR. GALARDI: I did not intend, but I don't have his
2 hand up.

3 THE COURT: Well --

4 MR. GALARDI: I can't --

5 THE COURT REPORTER: Your Honor, this -- this is Ms.
6 Parada. He's lowered his hand.

7 THE COURT: Oh, he's lowered his hand? Okay.

8 THE COURT REPORTER: Now, he has. Yes.

9 THE COURT: Okay.

10 MR. GALARDI: He probably wanted to put it over my
11 mouth, Your Honor, at certain points, but he's unable to do so.

12 THE COURT: Okay.

13 MR. GALARDI: And finally, Your Honor, so with respect
14 to waiver and forfeiture, we don't believe that there was
15 either a waiver or forfeiture.

16 And then finally, with respect to 60(b), Your Honor,
17 again as made clear in our initial motion and otherwise, it was
18 brought as an abundance of caution to challenge or to
19 reconsider the confirmation order and the plan. We have cited
20 cases that would permit us to do it. I understand Mr. Slack's
21 argument, but our view is that we could seek but do not think
22 we need to seek --

23 THE COURT: Well, I mean, I couldn't find anything
24 that would fit you telling the traditional thing. You didn't
25 cite newly discovered evidence. You didn't talk about a change

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1 in law, obviously. So any of the traditional 60(b) relief, I'm
2 not sure where you'd find it. But if you want --

3 MR. GALARDI: Well, Your Honor, I guess the
4 question --

5 THE COURT: Within this motion you don't need 60(b).

6 MR. GALARDI: I don't think -- obviously, if we have
7 succeeded on the first part that it's not exculpated and
8 released, 60(b) goes by the wayside unnecessary. If, however,
9 Your Honor were to read, which we don't think you can, the
10 release and exculpation clauses, then I would say that that
11 would be a mistake of law or fact or manifest error, so you
12 could use 60(b). We don't think that's necessary because --

13 THE COURT: Well, what's the difference between a
14 manifest error and an error? In other words, what -- I mean,
15 seriously --

16 MR. GALARDI: Well --

17 THE COURT: -- if I agree with Mr. Slack and I believe
18 that his interpretation of 10(b) fits, how do I come up with a
19 60(b) theory that gives you a second bite of the apple? You
20 don't have newly discovered evidence. You don't have a change
21 in law. If you want me to say a manifest injustice, that's a
22 last gasp for people. What else would I do? In other words,
23 let's try it a different way. If is say I think you should win
24 but you lose on 10.8, how would I articulate the 60(b)
25 justification to give you another crack at it?

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1 MR. GALARDI: Well, two things. One is, to me, the
2 60(b) is a factual issue raised on the waiver. But if you were
3 to find that that was a manifest error of law, that the release
4 could not be that broad, then you could give the relief there.
5 But again, I think the fundamental point is we believe that the
6 first argument is we can simply bring the administrative claim.
7 They can object to it. It's not exculpated, and it's not
8 released.

9 THE COURT: Okay. I gotcha.

10 Mr. Anker, did you want to add some more?

11 MR. ANKER: Yeah, just a couple of points, Your Honor.
12 Let me start with exculpation. I want to go beyond, although I
13 certainly agree with Mr. Galardi that the basic rule is the
14 specific controls over the general. So the language in the
15 exculpation clause referring to the RSA and being limited to
16 pursuit and negotiation has to control over other provisions.
17 It would be rather odd that there's a reference to the RSA. It
18 doesn't mention breach but other provisions that don't mention
19 the RSA somehow exculpate for a claim for breach. But let me
20 go beyond that.

21 The proposition Mr. Slack asserted is that our claim
22 arises (audio interference) he says the exit financing or the
23 amendment to the backstop. No, it doesn't. Our claim is for
24 (audio interference) RSA and only breach of the RSA. It arises
25 out the rights provided in the RSA. The RSA and the RSA alone

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1 obligated the debtors to use best efforts to get us into the
2 funding. So none of those other provisions by their terms,
3 even if one were to look at them notwithstanding the rule that
4 the specific controls over the general, none of them applies
5 here.

6 And finally, on the first clause and on this I will
7 say Mr. Slack's right about one thing. The provision saying
8 that there's exculpation for all claims in connection with or
9 arising out of the administration of the Chapter 11 cases
10 doesn't refer to pursuit and negotiation. But again, the
11 specific controls over the general and again that proves too
12 much. I don't mean to keep beating this horse but, Your Honor,
13 the fees of every professional in this case arise out of or in
14 connection with the administration of the Chapter 11 case. And
15 unless Your Honor is prepared to hold that every professional
16 did this case pro bono, that provision can't mean what the
17 debtors are saying it means.

18 THE COURT: Well, that's kind of a tempting way to
19 resolve it, I should think. I should give that some
20 consideration.

21 MR. ANKER: I will not so argue, Your Honor. I'm here
22 to let my clients have a claim, not to take money out of the
23 pockets of professionals who worked quite hard.

24 THE COURT: Okay.

25 MR. ANKER: Let me go on the release and try to

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1 explain why I think does it apply to pre-effective or post-
2 effective date is a red herring. Let's look at the language at
3 the very beginning on 10.9(b). It says, except for the rights
4 that remain in effect from and after the effective date to
5 enforce the plan and the plan documents. So let's ask a
6 question. Do admin claimants have right under the plan, do
7 they have a right to assert an admin claim? It can be objected
8 to. It may be disallowed on the merits because it doesn't
9 satisfy the standard for an admin claim. But with the respect
10 to conduct that occurred between the petition date and the
11 effective date, does the plan provide a right after the
12 effective to assert that claim and, if it is allowed, to demand
13 payment in full? Absolutely. Section 2.1 and 7.2 specifically
14 give every admin claimant the right after the effective date to
15 assert an admin claim, obtain an adjudication from Your Honor,
16 and if it is allowed obtain payment in full from the
17 reorganized debtors. That is the beginning and the end of the
18 point.

19 And I will say again, the professionals in this case
20 who are releasing parties by definition are filing fee
21 applications after the effective date to enforce their right
22 under the plan to have those fees, if allowed, paid by the
23 debtors and obtain adjudication. I don't begrudge them that.
24 That's exactly the same reason why (audio interference) not to
25 have a claim allowed without Your Honor concluding that it is a

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1 valid admin claim, but a valid admin claim the plan preserved
2 our right to assert it. And as Mr. Galardi points out, many
3 plans set a cutoff date. Sometimes before -- not typically
4 before the effective date, but shortly thereafter for the
5 filing of an admin claim. Here, this plan contained no such
6 limitation, so you simply look to the statute of limitations
7 under California, which was four years from the breach. This
8 breach occurred a few weeks before we filed the claim, not more
9 than four years after we filed the claim.

10 THE COURT: Okay. I'm going to -- I'm going to cut
11 you off only because I think we've been through this in --

12 MR. ANKER: That's right.

13 THE COURT: -- the past. Mr. Simonds --

14 MR. ANKER: And Your Honor, that's all I have, unless
15 you have questions of me.

16 THE COURT: No, I don't.

17 Mr. Simonds, did you want to add anything?

18 MR. SIMONDS: No, Your Honor. I agree; between Mr.
19 Galardi, Mr. Anker, and I, we had Mr. Anker and Galardi cover
20 the principle arguments. I reserved time in case I had
21 something to add on rebuttal, but that's not necessary. I
22 think they covered --

23 THE COURT: And we did you -- we did you a disservice
24 by leaving you on the screen. You had to sit there and pay
25 attention.

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1 How about you, Mr. Karotkin? Did you want to add
2 anything?

3 MR. KAROTKIN: Yes. If you don't mind, Your Honor, I
4 have just a couple of sentences.

5 First of all, Mr. Anker -- and I appreciate Mr.
6 Anker's concern for my firm's fees, but Mr. Anker did say when
7 he was describing the word pursuit, he said that pursuit
8 includes the observance or carrying out of an agreement or plan
9 and encompasses getting everything to the finish line. Now,
10 how anyone can explain to me how the word pursuit could not
11 encompass the performance of the parties' obligations under the
12 noteholder RSA and their covenants under the noteholder RSA
13 under any rational interpretation of the word pursuit just
14 defies logic. It's completely irrational.

15 And the last thing I'll say, Your Honor, is what you
16 said. Mr. Anker's argument about the release is completely
17 circular. There is no right to assert an administrative
18 expense claim for something that has been released or
19 exculpated under the plan. They specifically required as part
20 of the noteholder RSA that they be included as released parties
21 and exculpated parties. That's what they insisted on, and
22 that's the consequence of it. They released these claims.
23 They arise under the noteholder RSA. How else could they
24 arise? And how could pursuit not include the word or not
25 include performance under an agreement? Your Honor, that's

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1 what they're asking you to find, and frankly I don't know how
2 you possibly could find that.

3 THE COURT: Well --

4 MR. KAROTKIN: That's all I have.

5 THE COURT: -- but I guess I could say I don't why you
6 wouldn't put in a breach prior to the effective date as an
7 exculpation. I mean, I hope you'll strike the word pursuit
8 from your firm's form file for the future and keep it, reserve
9 it only for going after criminals.

10 MR. KAROTKIN: Well --

11 THE COURT: I'm going to -- I'm going to think about
12 this, take it under advisement. I'll do my best to do it
13 quickly. Again, I won't apologize more than one more time
14 about the connections because it worked fine once I turned my
15 camera off. So I want to thank you all for your thorough
16 briefing and patience today, and I will take the matter under
17 advisement and wish you all a good day.

18 IN UNISON: Thank you, Your Honor.

19 THE COURT: Thank you, Ms. Parada and Ms. Thomas.

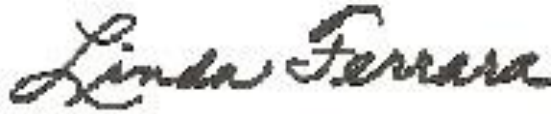
20 THE COURT REPORTER: Yes, Your Honor.

21 THE COURT: We'll conclude the hearing. Thank you.

22 (Whereupon these proceedings were concluded at 11:23 AM)

C E R T I F I C A T I O N

I, Linda Ferrara, certify that the foregoing transcript is a true and accurate record of the proceedings.



/s/ LINDA FERRARA, CET-656

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Date: October 14, 2020

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